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**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA**

CALifornians for Renewable Energy, a  
 California non-profit public benefit  
 corporation representing California  
 consumers, and its counsel, Stephan C.  
 Volker,

Plaintiffs,

v.

California Public Utilities Commission,  
 Michael R. Peevey, in his official and  
 individual capacity, Dian Gruenich, in her  
 official and individual capacity, John  
 Bohn, in his official and individual  
 capacity, Rachelle Chong, in her official  
 and individual capacity, Timothy Simon, in  
 his official and individual capacity, and  
 Geoffrey Brown, in his official and  
 individual capacity,

Defendants.

Civ. No. C08-01954-JL

**FIRST AMENDED COMPLAINT  
 FOR VIOLATION OF  
 CONSTITUTIONAL,  
 STATUTORY AND COMMON  
 LAW CIVIL RIGHTS; DEMAND  
 FOR JURY TRIAL**

**JURY TRIAL DEMANDED**

(F.R.C.P. 15(a)(1)(A))

Judge: Hon. James J. Larson,  
 Magistrate-Judge

Plaintiffs, CALifornians for Renewable Energy (“CARE”) and Stephan C. Volker, allege  
 as follows:

**I. INTRODUCTION**

1. This civil rights action is brought to redress violations of plaintiffs’ due  
 process rights under the Fifth and Fourteenth Amendments of the United States  
 Constitution and article I, section 7 of the California Constitution by the California  
 Public Utilities Commission and the above-named individual Commissioners comprising  
 the Commission (collectively the “Commission” or “defendant”) when it arbitrarily set

1 rates for intervenors' advocates and experts who appear before the Commission without  
2 notice to them in violation of their right to proper compensation under the procedures  
3 established in California Public Utilities Code section 1801 *et seq.*

4         2. The California Public Utilities Code provides in section 1804 that  
5 intervenors who make a substantial contribution to the decisionmaking process of the  
6 Commission on behalf of the utility-consuming public are entitled to appropriate  
7 compensation. Public Utilities Code section 1806 directs in pertinent part that "[t]he  
8 computation of compensation awarded pursuant to Section 1804 shall take into  
9 consideration the market rates paid to persons of comparable training and experience  
10 who offer similar services." Further, Public Utilities Code section 1807 directs that all  
11 payments under the intervenor compensation program "shall be paid by the public utility  
12 which is the subject of the hearing, investigation, or proceeding . . .," and not by either  
13 the Commission, or by the State of California.

14         3. Without notice to plaintiffs nor consideration of the market rate of plaintiff  
15 Stephan C. Volker, a licensed attorney of 34 years' experience, the Commission  
16 determined that the prior rates paid to intervenors' advocates and experts shall be fixed  
17 as their "market rates" and thereafter be frozen at those prior levels (subject to periodic  
18 cost-of-living increases at the Commission's discretion). Neither plaintiff CARE, nor  
19 CARE's lead counsel in many Commission proceedings, plaintiff Stephan C. Volker,  
20 was given notice of the Commission's informal and only selectively noticed intervenor  
21 rate-freezing proceedings. Thus, CARE was never offered an opportunity to explain to  
22 the Commission before it made this determination that the rate previously awarded Mr.  
23 Volker was a discounted public interest rate *not based on his market value*.  
24 Consequently, Mr. Volker was and has been locked into a low, *below*-market rate,  
25 despite his entitlement to "market rates" under the Public Utilities Code.

26         4. The Commission's lack of notice to plaintiffs prior to its determination of  
27 Mr. Volker's rate therefore violated Mr. Volker's and CARE's due process rights under  
28 the Fifth and Fourteenth Amendments of the United States Constitution and article I,

1 section 7 of the California Constitution. CARE thus seeks both a prospective and a  
2 retroactive adjustment to the Commission's determination of Mr. Volker's rate that takes  
3 into consideration his true market rate, as required by the Public Utilities Code, and a  
4 recalculation of his attorney fee awards that have been handed down by the Commission  
5 since its erroneous rate freeze determination. CARE also seeks a declaration that Mr.  
6 Volker's hourly rate in future Commission proceedings should be based on his market  
7 rate and not on the below-market rate previous assigned to him by the Commission in its  
8 intervenor rate-setting proceeding.

## 9 **II. JURISDICTION**

10 5. This case is brought pursuant to 42 U.S.C. §§ 1983 and 1985, the Fifth and  
11 Fourteenth Amendments to the United States Constitution, and 28 U.S.C. §§ 1331 and  
12 1343. This Court has supplemental jurisdiction over plaintiffs' state law claims pursuant  
13 to 28 U.S.C. § 1367 and 42 U.S.C. § 1988.

## 14 **III. VENUE**

15 6. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(b) because  
16 defendant resides, and plaintiffs' claims arose, in this judicial district.

## 17 **IV. DEMAND FOR JURY TRIAL**

18 7. Plaintiffs request a jury trial on their claims.

## 19 **V. PARTIES**

20 8. Plaintiff CARE, at all times mentioned in this complaint, has been and now  
21 is a non-profit public benefit corporation organized under the laws of California in 1999  
22 for the purpose of educating the public about, and encouraging public agencies to  
23 consider, alternative forms of renewable energy as a means of avoiding (1) dependence  
24 on declining supplies of fossil fuels and (2) the harmful air emissions their use  
25 occasions. CARE and its members are beneficially interested in securing this Court's  
26 review of the Commission's decisions so that its counsel will be fairly compensated for  
27 his work done on CARE's behalf in the Commission. CARE also seeks review of the  
28 Commission's compensation decisions to ensure that it can procure adequate counsel in

1 future proceedings. CARE seeks to eliminate the risk that counsel for public-interest,  
2 non-profit organizations may not, in the future, be able to participate in important  
3 Commission decisionmaking processes due to the Commission's unnoticed and  
4 erroneous determination of intervenors' hourly rate compensation.

5 9. Plaintiff Stephan C. Volker is a public interest environmental lawyer with a  
6 small private practice in Oakland, California. Mr. Volker's firm brings lawsuits and  
7 participates in administrative agency proceedings to enforce environmental laws,  
8 typically on behalf of conservation organizations and citizens' groups. Mr. Volker has  
9 practiced environmental law since 1974. Mr. Volker represented CARE in the  
10 proceedings in question before the Commission.

11 10. Defendant California Public Utilities Commission is a special-purpose  
12 public agency established and operating independently from the State of California,  
13 vested with authority to regulate public utilities pursuant to article XII, section 5 of the  
14 California Constitution and California Public Utilities Code section 701. The  
15 Commission does not perform central governmental functions, and its rulings are not  
16 subject to control by the state government. The Commission's awards of compensation  
17 for intervenors in proceedings before the Commission are paid by regulated utilities and  
18 never by the Commission or the State of California.

19 11. Defendant Michael R. Peevey is the President of the Commission and has  
20 served on the Commission since March 2002. In making the decisions challenged in this  
21 action, Defendant Peevey acted under the color of state law.

22 12. Defendant Dian Gruenich has served on the Commission since January 18,  
23 2005. In making the decisions challenged in this action, Defendant Gruenich acted  
24 under the color of state law.

25 13. Defendant John Bohn has served on the Commission since May 5, 2005.  
26 In making the decisions challenged in this action, Defendant Bohn acted under the color  
27 of state law.

1           14. Defendant Rachelle Chong has served on the Commission since January  
2 12, 2006. In making the decisions challenged in this action, Defendant Chong acted  
3 under the color of state law.

4           15. Defendant Timothy Simon has served on the Commission since February  
5 2007. In making the decisions challenged in this action, Defendant Simon acted under  
6 the color of state law.

7           16. Defendant Geoffrey Brown served on the Commission from January 18,  
8 2002 until he was replaced by Commission Simon in February 2007. In making the  
9 decisions challenged in this action, Defendant Brown acted under the color of state law.

#### 10                                   **VI. STATEMENT OF THE CASE**

11           17. As alleged above, the California Public Utilities Code provides a procedure  
12 by which intervenors who make a substantial contribution to a Commission decision may  
13 claim compensation. Public Utilities Code section 1806 directs in pertinent part that  
14 “[t]he computation of compensation awarded pursuant to [the Public Utilities Code] shall  
15 take into consideration the market rates paid to persons of comparable training and  
16 experience who offer similar services.”

17           18. On August 19, 2004, the Commission issued Decision 04-08-046 in which  
18 it granted a Certificate of Public Convenience and Necessity to Pacific Gas & Electric  
19 Company (“PG&E”) to construct the Jefferson-Martin(“J-M”) transmission line to  
20 provide an alternative source of electricity to San Francisco, thereby eliminating its  
21 dependence on the highly-polluting, fossil-fuel powered Hunter’s Point Power Plant that  
22 had been contaminating poor communities of color near the plant. CARE had intervened  
23 in that proceeding on behalf of its members residing in the Hunter’s Point community  
24 and advocated successfully in favor of the Commission’s approval of the J-M line. On  
25 October 7, 2004, CARE timely filed a Request for Award of Compensation and  
26 supporting declarations based on its substantial contribution to the resolution of that  
27 case. Along with its application for fees, CARE submitted documentation demonstrating  
28 that Mr. Volker’s market rates were at least \$400 per hour at that time.

1           19.     On April 13, 2006, the Commission issued D.06-04-018, granting  
2 intervenor compensation to CARE for substantial contributions to Decision 04-08-046.  
3 However, instead of awarding Mr. Volker his market rate, the Commission reduced the  
4 hourly rate for Mr. Volker from the requested \$400 to \$270, citing for support two prior  
5 Commission decisions, Resolution ALJ-184 ("ALJ-184") and D.05-11-031. In those  
6 decisions, the Commission had, without notice to Mr. Volker, fixed his rate based on a  
7 below-market rate previously awarded Mr. Volker after he had agreed to represent the  
8 Sierra Club, a public benefit charitable organization, at a reduced rate in a previous  
9 proceeding.

10           20.     On April 17, 2006, CARE timely filed a petition for modification of D.06-  
11 04-018, requesting that Mr. Volker's fee be modified to conform to his market rate.  
12 Citing Public Utilities Code section 1806, CARE submitted further documentation  
13 attesting to Mr. Volker's qualifications and experience and demonstrating that his hourly  
14 rate at that time was *at least* \$400. On June 15, 2006, the Commission issued D.06-06-  
15 025, denying CARE's petition for modification of D.06-04-018. On July 13, 2006,  
16 CARE timely filed a petition for rehearing of D.06-06-025, again requesting that Mr.  
17 Volker's fee be modified to reflect his current market rate. On October 5, 2006, the  
18 Commission issued D.06-10-023, denying CARE's petition for rehearing of D.06-04-  
19 018.

20           21.     The Commission's stated reason for reducing Mr. Volker's hourly rate to  
21 \$270 was that it had awarded Mr. Volker an hourly rate of \$250 several years previously  
22 in a different proceeding in which Mr. Volker represented the Sierra Club. The basis of  
23 that previous hourly rate, however, was *not that Mr. Volker's market rate was then \$250*.  
24 Rather, the basis was that Mr. Volker's client in that matter, the Sierra Club, had, on  
25 April 4, 2000 and prior to its retention of Mr. Volker, filed a Notice of Intent to Claim  
26 Compensation ("NOI") which capped its future counsel's hourly rate at \$250. Therefore,  
27 notwithstanding that Mr. Volker's actual market rate in 2000 already exceeded \$300, the  
28 Sierra Club only sought compensation at the rate stated in its NOI – \$250.

1           22.     In its calculation of Mr. Volker's rate, the Commission cited ALJ-184 and  
2 D.05-11-031. Specifically, the Commission stated in attempted justification of its  
3 decision to freeze Mr. Volker's hourly rate at the prior, below-market rate:

4           In Resolution ALJ-184, we set forth guidelines and principles for setting  
5 intervenors' hourly rates for work performed in 2004. In D.05-11-031, we  
6 set forth guidelines and principles for setting 2005 rates, and found that  
7 rates previously adopted in 2003 and 2004 are reasonable. Resolution  
8 ALJ-184 deems an increase of 8% above previously adopted 2003 rates as  
reasonable for work performed in 2004. We previously adopted a rate of  
\$250 for Volker for work performed in 2000-2003. Increasing Volker's  
2003 rate by 8% results in the \$270 rate adopted in D.06-04-018 for his  
2004 work.

9 Plaintiffs bring this action to secure a judicial declaration that the Commission's  
10 arbitrary basis for determining Mr. Volker's rate, as delineated in ALJ-184 and D.05-11-  
11 031, is unconstitutional because it deprived plaintiffs of the fair market value of Mr.  
12 Volker's services without due process of law.

13           23.     Prior to conducting the intervenor rate-setting proceedings that resulted in  
14 ALJ-184 and D.05-11-031, the Commission never gave notice to CARE, to Mr. Volker,  
15 or to many of the other intervenors' advocates or experts whose rates would be forever  
16 frozen (subject to cost-of-living adjustments) by the Commission's decision. Neither  
17 CARE nor Mr. Volker received notice by any means of the proceedings leading up to  
18 ALJ-184 and D.05-11-031.

19           24.     ALJ-184 was not the product of a properly-noticed proceeding in which all  
20 affected parties had an opportunity to participate and thereby be heard. According to  
21 ALJ-184, the administrative law judge in charge of the proceeding "wrote to over 40  
22 *regular participants* in our proceedings, including frequent intervenors and utilities from  
23 the various regulated industries [and] invited comments and suggestions to begin  
24 development of this annual process." ALJ-184 at 1, emphasis added. Only nine parties  
25 submitted comments. Neither CARE nor Mr. Volker was among those surveyed.  
26 Neither had actual notice of the survey. Although the Commission provided notice to  
27 and solicited comments from Commission *insiders*, it failed to warn other practitioners



1 such as Mr. Volker that their future intervenor rates would be fixed indefinitely by the  
2 proceeding.

3 25. Decision 05-11-031 resulted from a rulemaking instituted by the PUC.  
4 Neither CARE nor Mr. Volker received notice by mail, fax or email of this proceeding.  
5 Nor did they have actual notice of this rulemaking. Only four regulated utilities and four  
6 frequent intervenors participated in this proceeding.

7 26. Thus, Mr. Volker, along with any other advocate or expert not on the  
8 Commission's selective, insider mailing list for the ALJ-184 and D.05-11-031  
9 proceedings, was denied notice of those proceedings even though they converted *all* of  
10 the 2003 rates – market and non-market alike – into “reasonable market rates” to be  
11 applied to all future fee awards. Consequently, the Commission denied many potential  
12 intervenors their right to notice of the Commission's rate-freezing proceeding, despite  
13 the fact that the Commission's decision would have far-reaching impacts on the ability  
14 of intervenors, such as CARE, to procure counsel and expert advice for assistance and  
15 representation in the future. The Commission therefore failed to comply with the  
16 procedural due process guarantees of the Fifth and Fourteenth Amendments of the  
17 United States Constitution and article I, section 7 of the California Constitution when it  
18 approved ALJ-184 and D.05-11-031 and subsequently limited Mr. Volker's future  
19 compensation awards significantly below the market rate to which he was entitled  
20 without giving him notice and an opportunity to be heard to correct this error.

21 27. Since ALJ-184 and D.05-11-031, the Commission has continued to assign  
22 Mr. Volker rates in the \$250-290 range – even after cost-of-living adjustments – despite  
23 CARE's and Mr. Volker's documentation in each request for compensation of the fact  
24 that Mr. Volker's market rate was between \$400 and \$650 per hour. Exacerbating its  
25 initial denial of plaintiffs' due process rights, the Commission has continued to deprive  
26 plaintiffs of their statutory right to have Mr. Volker's fees determined in light of “the  
27 market rates paid to persons of comparable training and experience who offer similar  
28 services,” as required by California Public Utilities Code section 1806.



1           28.     For example, in A.99-09-053, a case in which Mr. Volker successfully  
2 advocated protection of the Eel River and other rivers affected by PG&E's hydroelectric  
3 dams proposed for sale or auction, the Commission reduced Mr. Volker's past rates to  
4 below-market rates based on its rate-freezing decisions. D.07-12-004, issued on  
5 December 7, 2007.

6           29.     And in R.06-03-004, a rulemaking designed to give structure to the  
7 California Solar Initiative ("CSI"), in which Mr. Volker successfully advocated for  
8 greater public access to solar power, the Commission again reduced Mr Volker's  
9 requested market rate to a below-market rate. D.07-12-007, issued on December 7,  
10 2007.

11           30.     Additionally, the Commission will soon issue a ruling on Mr. Volker's fee  
12 request in C.07-03-006, a case challenging the placement of a youth sports complex over  
13 an unsafe, thin-walled, high pressure natural gas pipeline in which Mr. Volker  
14 successfully advocated for replacement of the unsafe pipeline. While the rate that will  
15 be assigned to Mr. Volker for this proceeding is unknown at present, plaintiffs reserve  
16 the right to file a supplemental pleading to include the Commission's ruling on Mr.  
17 Volker's fee request in C.07-03-006, if indeed the Commission once again employs its  
18 unconstitutional rate-freezing mechanism and bases Mr. Volker's rate based on the non-  
19 market rate assigned to him years ago in an unrelated proceeding.

20           31.     Because plaintiffs never received notice of the Commission's rate-freezing  
21 proceedings that resulted in ALJ-184 and D.05-11-031, the Commission cannot  
22 constitutionally apply those decisions to fee awards submitted by plaintiffs, nor escape  
23 adjudication of its failure to provide notice under the Johnson Act, 28 U.S.C. § 1342(3).  
24 The initial, inadequately-noticed rate-freezing proceedings and resulting orders formed  
25 the foundation on which the Commission based all subsequent incorrect rate  
26 determinations. The Commission's failure to give adequate notice to the parties directly  
27 affected by the Commission's rate-freezing orders constitutes a violation of those  
28

1 parties' due process and civil rights, including, but not limited to, the due process and  
2 civil rights of plaintiffs.

### 3 **VII. STATE COURT PROCEEDINGS**

4 32. Plaintiff CARE filed a petition for a writ of review in the California Court  
5 of Appeal challenging the Commission's decision in the Jefferson-Martin case on  
6 November 3, 2006. The petition raised only statutory claims based on the language of  
7 California Public Utilities Code section 1806, and did not allege any constitutional  
8 violations.

9 33. Without conducting a hearing or ordering the record from the Commission,  
10 the Court of Appeal summarily denied CARE's writ petition. The entirety of the ruling  
11 stated: "[t]he petition for writ of review is denied." CARE's subsequent petition for  
12 review to the California Supreme Court was never adjudicated on the merits, as CARE's  
13 motion to allow its late filing was summarily denied.

14 34. CARE does not have a plain, speedy, and efficient remedy in the courts of  
15 California, and thus the Commission may not escape review by this Court under the  
16 Johnson Act, 28 U.S.C. § 1342(4).

### 17 **VIII. FIRST CLAIM FOR RELIEF**

18 **FOR DENIAL OF DUE PROCESS RIGHTS SECURED BY THE FIFTH AND**  
19 **FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND THE CIVIL**  
**RIGHTS ACT OF 1964**

20 (Against Defendants California Public Utilities Commission, Michael R. Peevey,  
21 in his official and individual capacity, Dian Gruenich, in her official and  
22 individual capacity, John Bohn, in his official and individual capacity,  
23 Rachelle Chong, in her official and individual capacity, Timothy Simon,  
in his official and individual capacity, and Geoffrey Brown,  
in his official and individual capacity)

24 42 U.S.C. § 1983

25 35. The paragraphs set forth above are realleged and incorporated herein by  
26 this reference.

27 36. In freezing CARE's lead counsel's assigned hourly rate at a lower, below-  
28 market rate, without giving plaintiffs notice and an opportunity to be heard to correct this  
error, the Commission violated plaintiffs' due process rights. CARE and Mr. Volker

1 have been and will continue to be adversely affected by the Commission's arbitrary and  
 2 unfair decision. CARE has a right to receive fair, market-based compensation for its  
 3 advocates, and Mr. Volker has a right to be compensated for his legal services, in the  
 4 manner prescribed by California Public Utilities Code section 1806, which states that  
 5 "[t]he computation of compensation awarded pursuant to Section 1804 shall take into  
 6 consideration the market rates paid to persons of comparable training and experience  
 7 who offer similar services."

8 37. The Commission's continuing actions to circumvent plaintiffs' entitlement  
 9 to market-based fees, based on a miscalculation of those fees without notice to CARE or  
 10 Mr. Volker, violate the Fifth and Fourteenth Amendments' guarantee that due process be  
 11 provided before a state may deprive a person such as Mr. Volker, or an organization of  
 12 persons such as CARE, of property.

#### 13 **IX. SECOND CLAIM FOR RELIEF**

14 FOR DENIAL OF DUE PROCESS RIGHTS SECURED BY ARTICLE I, SECTION 7  
 15 OF THE CALIFORNIA CONSTITUTION AND THE CIVIL RIGHTS ACT OF 1964.

16 (Against Defendants California Public Utilities Commission, Michael R. Peevey,  
 17 in his official and individual capacity, Dian Gruenich, in her official and  
 18 individual capacity, John Bohn, in his official and individual capacity,  
 19 Rachelle Chong, in her official and individual capacity, Timothy Simon,  
 20 in his official and individual capacity, and Geoffrey Brown,  
 21 in his official and individual capacity)

22 42 U.S.C. § 1983

23 38. The paragraphs set forth above are realleged and incorporated herein by  
 24 this reference.

25 39. The Commission's continuing actions to circumvent plaintiffs' entitlement  
 26 to market-based fees, based on a miscalculation of those fees without notice to CARE or  
 27 Mr. Volker, violates the prohibition in article I, section 7 of the California Constitution  
 28 that a person such as Mr. Volker, or an organization of persons such as CARE, may not  
 be deprived of property without due process of law.

#### 29 **X. RELIEF REQUESTED**

WHEREFORE plaintiffs demand judgment against defendants as follows:

A. Declaratory Relief:

1. A declaration that the non-market rates that the Commission has assigned to Mr. Volker in ALJ-184 and D.05-11-031, and in the proceedings subsequent thereto including those culminating in D.06-04-018, D.07-12-004 and D.07-12-007, are invalid.
2. Litigation costs and attorneys' fees.

B. Equitable Relief:

1. An injunction directing the Commissioners to recalculate Mr. Volker's attorney's fees based on his market rates in the proceedings culminating in ALJ-184, D.05-11-031, D.06-04-018, D.07-12-004, and D.07-12-007.
2. An injunction restraining the Commissioners from using non-market rates when assigning a rate to Mr. Volker in the future.

C. Other Relief:

1. Such other and further relief as may appear appropriate and just.

DATED: July 16, 2008

Respectfully submitted,

LAW OFFICES OF STEPHAN C. VOLKER

By: /s/ Stephan C. Volker

STEPHAN C. VOLKER  
Attorneys for Plaintiffs